

JUDICIAL ACTIVISM IN THE “EYE OF THE BEHOLDER”: THE ISRAELI HIGH COURT OF JUSTICE AND THE HUMAN RIGHTS OF THE PALESTINIANS IN THE OCCUPIED TERRITORIES

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“The words a judge must construe are ‘empty vessels into which he can pour nearly anything he will”

– American Judge Learned Hand Dictum –

Introduction

To date, it is widely acknowledged that the role of judicial institutions is becoming more central to the process of policy-making, both at the national and international levels.² This is equally the case of the Israeli High Court of Justice (HCJ),³ whose role in promoting the protection of the human rights of the Palestinians in the West Bank and Gaza Strip (thereafter Occupied Palestinian Territory “Opt”), is the focus of this brief paper.⁴

Any effort to understand the effectiveness of the HCJ’s judicial review of the Palestinians’ fundamental human rights, requires the examination of the process of judicial review by the HCJ of legislation, and of administrative decision-making that affect human rights more generally. And while any attempts to address this topic in this paper will be far from comprehensive, I hope to highlight a problematic that presents itself, and which has implications for the HCJ review of the human rights of the Palestinians in the Opt more specifically.

I. Theories on Judicial Review

² Yoav, Dotan, “Judicial Accountability in Israel: the High Court of Justice and the Phenomenon of Judicial Hyper activism”, 8:4 *Israel Affairs*, (2002), pp. 87-106.

³ Shortly after Israel occupied the West Bank and Gaza Strip in 1967, the HCJ declared that it has legal jurisdiction over petitions by Palestinians therein, challenging the legality of actions, policies, and decisions of the Israeli government and military in the Opt.

⁴ In September 2005, Israel completed its Disengagement Plan, by withdrawing its military presence from the Gaza Strip, and proclaimed an official decree ending military rule there. However, the debate regarding its legal status, and whether or not Israel remains an Occupying Power in effective control of that territory, remains a subject of debate amongst the legal community. On one hand are those who argue that by virtue of the “Disengagement Plan,” Israel is no longer the Occupying Power under the law of occupation, while others underline that the legal status has not changed due to the fact that the Gaza remains under Israel’s effective control. For two opposing views, see Yuval Shany, “Faraway, So Close: the Legal Status of Gaza After Israel’s Disengagement”, *Research Paper* No. 12,-06, International Law Forum, the Hebrew University, Jerusalem, (August 2006), and Ardi Imseis, "ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion" 99 *American Journal of International Law* (2005), p. 21. This author supports the view that the Gaza Strip remains an occupied territory.

Any effort to understand the effectiveness (or lack thereof) of judicial review by the HCJ, requires a closer examination of the process of judicial reviews. In this regard, the literature review suggests that the HCJ has adopted a “judicially active” approach vis-à-vis the protection and promotion of human rights more generally.

1.1. Judicial Review, Democracy, & the Rule of Law: A Brief Overview

1.1.1. The Compatibility of Judicial Review with Democracy

The entire debate on the process of judicial review by the HCJ, takes for granted the notion that Israel is a (parliamentary) democratic system. Founded in 1948,⁵ it prides itself to be a state that is both “democratic” and “Jewish”, and to be based on the principle of the separation of powers, and the rule of law.⁶

The compatibility of judicial review with democracy has often been at the center of debate amongst legal jurists. Since then, Constitutional theory has been dominated by the questions of whether, and when, it would be appropriate for a judge to overrule the will of a governing majority.⁷ The debate is all the more intense when the legality of judicial review has been examined within the context of a majoritarian democracy.⁸ Today, a central feature of the ongoing debate has revolved around the notion of whether judicial review poses “a counter-majoritarian difficulty”.⁹

⁵ Israel was established on an estimated 78% of Historic Palestine that up and had been under British mandate. Israel’s war of independence displaced, expelled, and made to flee an estimated 700,000 Palestinian refugees. Those who remained became Israeli Arab Citizens. Today, they constitute approximately 20% of the population of Israel, or an estimated 1.4 million.

⁶ In Israel, you have the legislative branch (the Knesset) which consists of 120 elected representatives-; the Executive, and the Judiciary). See “Political Structure and Elections” available at http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2001/6/Political%20Structure%20and%20Elections

⁷ David Law, “A Theory of Judicial Power and Judicial Review”, 97 *Georgetown Law Journal* (2009), pp. 723-801.

⁸ Majoritarianism in itself has been defined by Rawls to require that each citizen is granted one equal vote, and that simple majorities control the course of government. See Harry Wellington, “The Nature of Judicial Review”, 91:3 *Yale Law Journal*, Volume 91 (January 1982), pp. 486-520.

⁹ This phrase was first coined by Alexander Bickel, cited in Jeremy Waldron, “The Core Case Against Judicial Review”, 115:6 *Yale Law Journal* (April 2006), pp. 1346-1406.

On one side of the spectrum, there are those who argue that judicial review is a participatory form of decision-making, and that by enforcing limitations on the legislature, it provides “mechanisms for a faithful implementation of the will of the people”,¹⁰ thereby making it compatible with democracy. In this regard, legal theorists such as Rawls have argued that even in a democracy, there always remains the risk of people making errors on the content of the general good, and that the ruling majority could end up violating the legitimate claims of the minority. Consequently, judicial review can help complement the deliberative function of the legislator,¹¹ by acting as a necessary constraint on governmental action.¹² It has also been argued that it is unrealistic to expect legislators to be at all times capable of realizing what rights based issues are embedded in a legislative proposal, or which rights may arise from the application of that legislation.¹³ As “disinterested generalists”, judges are viewed as better capable of serving the distinctive function of protecting the principles that make up “our political inheritance” against majority preferences.¹⁴

On the other side of the spectrum, are those who argue that this kind of review protects vested interests, thereby making the notion of judicial review inherently incompatible with the principles of democracy. According to this argument, given the fact that justices are not directly elected and accountable to the people, judicial review threatens to disenfranchise ordinary citizens, thereby undermining the principles of representation and political equality.¹⁵ Therefore, they should not have the right to interpret the Constitution.¹⁶ Others also highlight that a judicial diagnosis of the malfunction of a legislative or executive process entails in itself a value judgment,¹⁷ or have a difficulty accepting the finality of judicial decisions.¹⁸ Still a third group believes that it is not entirely impossible to accommodate judicial review with the theory and practice of democracy.¹⁹

¹⁰ Alon Harel, “Rights Based Judicial Review: A Democratic Justification”, 22: ¾ *Law and Philosophy* (July 2003), pp. 247-276.

¹¹ Horacio Spector, 22:3/4 “Judicial Review, Rights and Democracy”, *Law and Philosophy*, (July 2003), pp. 285-334.

¹² Harry Wellington, *supra* note 7.

¹³ Jeremy Waldron, *supra* note 8.

¹⁴ Harry Wellington, *supra* note 7.

¹⁵ Jeremy Waldron, *supra* note 8.

¹⁶ In this regard, some have noted that “judicial review” is incompatible with democratic values even if geared towards the resolution of issues about rights Vukan Kuic, “Law, Politics and Judicial Review”, 52:2 *Review of Politics*, (Spring 1990), pp 265-284. In this regard, some have noted that “judicial review” is incompatible with democratic values even if geared towards the resolution of issues about rights

¹⁷ Harry Wellington, *supra* note 7.

¹⁸ *Ibid.*

¹⁹ Vukan Kuic, *supra* note 15.

It is not the objective of this paper to examine in depth the legal positions and argumentations in favor and against judicial review. Rather, it seeks to provide some justification for the position I will be adopting for purposes of this paper; namely that judicial review is compatible with a majoritarian democracy.

1.1.2. The Compatibility of Judicial Review with Democracy

The Rule of Law is deeply entrenched in the political culture of today's democracies. One useful starting point is the definition provided by Dicey²⁰ in which he refers to it as the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness of prerogative, or even if wide discretionary authority on the part of the government...It means equality before the law or the equal subjection of all classes to the ordinary law of the land administered by ordinary courts.²¹

Given that government is an essentially coercive power, and that parliamentary democracy is not "to be trusted" as capable of upholding individual human rights. According to Dicey, it is therefore for the common law courts to shoulder the responsibility of setting and enforcing the limits beyond which both the state and individuals should not go.²² Thus, since "judges are in no way dependent ...on the favor of the electors or even the ministers...[t]hey are more likely to be biased by professional habits".²³ As a result, courts are best suited to exercise a check on government, and to ensure that individual rights and freedom are upheld beyond the reach of the former. However, to do so, it is imperative that judges are independent, autonomous, and impartial.²⁴

²⁰ Albert Van Dicey, A, *An Introduction to the Study of the Law of the Constitution*, 10 ed. (London: Macmillan, 1959).

²¹ *Ibid.*

²² Bernard Hibbits, "The Politics of Principle: Albert Venn Dicey and the Rule of Law" *23 Anglo-American Law Review*, (1994), pp. 1-31.

²³ The reason for this is that according to Dicey, the adjudication by judges, unlike parliamentary law making is based on fixed principles or rules, thereby making the notion of "substantive limits" possible. It is important to bear in mind that Dicey only referred to common law adjudication. In his opinion, the fact that judges base the judicial outcome in a particular case on deductions from general legal principles, and apply similar principles to similar cases, allows for the maintenance of a fixed legal system that gave law its certainty. *ibid*

²⁴ Joseph Raz, "The Rule of Law and its Virtue" R. Bellamy, ed., *The Rule of Law and the Separation of Powers* (Adershot: International Library of Essays in Law and Legal Theory, 2005), pp. 77-93.

1.2. On Judicial Activism

Although the term “judicial activism” has become increasingly common, there is little consensus in the legal and scholarly community on the exact meaning of the term.²⁵ As early as 1947, A. Schlesinger Jr. first introduced the term in a Fortune magazine article, in the course of profiling all nine US Supreme Court justices. Although no definition of 'judicial activist' was offered in the article, Schlesinger sought to characterize the conflict he perceived between those judges belonging to the “activist” group and those belonging to the “Champions” of judicial restraint in a way that gave content to his coined term.²⁶

Given the wide spectrum of interpretations accorded to the term, it is important to identify the intended meaning through which this paper seeks to examine the ‘judicial activism’ of the HCJ vis-à-vis human rights issues. Academically, the label has been used to describe a wide spectrum of judicial actions as reflected in the decisions they have been rendered: ranging from overturning the will of the people by striking down legislation; unconstitutionally infringing on other branches of government; interpreting a text in a manner that exceeds its original meaning or language, to ruling on a predetermined ideological basis, or citing foreign precedent for constitutional interpretation.²⁷ Thus in line with what one author articulated, it is evident that to date, the term has been used to target both the substance and the procedure of judicial review, and that “allegations of judicial activism are inescapably normative because they presuppose claims about how judges should behave”.²⁸

²⁵ Keenan, Kmiec, “The Origin and Current Meaning of ‘Judicial Activism’”, 92 *California Law Review* (2004), pp. 1441-1477.

²⁶ Within this context, the term “Judicial Activists” was used to refer to those amongst the judges who believed that law and politics are inseparable; that policy judgments are inherently part of legal decisions; that the Court can play an affirmative role in promoting social welfare, and that judicial power can be employed to advance their own conception of the “social good”, and to achieve desired social results. The other group –supporters of self restraint- were depicted to support the notion that not all law is politics. Accordingly, laws, statutes, and constitutions carry fixed meanings from which deviation is not permissible. Deference to the “legislative will” must be maintained, and rests on the principle of the separation of power and the democratic process. They also believe that judicial review is not always a very efficient form of policy making, and that judges are not the best equipped to translate community values into constitutional policies. See Chief Justice French, “Judicial Activism: the Boundaries of the Judicial Role”, Lawasia Conference 2009, Vietnam, 10 November 2009, available at <http://www.hcourt.gov.au/speeches/frenchcj/frenchcj10Nov09.pdf>.

²⁷ Caprice Roberts,, “In Search of Judicial Activism: Dangers in Quantifying the Qualitative”, 74 *Tennessee Law Review*, (2006-2007), pp. 567-620.

²⁸ *Ibid*

Others have noted that “judicial activism” has wrongfully been employed for judicial opinions that “we do not like”,²⁹ and that in fact, it can carry positive connotations. In this regard, It is noteworthy to recall Dworkin’s arguments (when speaking about American polity) that “the majority must be restrained to protect individual rights”, and it would be unfair to let the majority “be the sole judge of their own decisions”.³⁰ Judicial activism has also been referred to as the conscious development of law “according to the perceptions of the court as to the direction the law should take in terms of legal, social or other policy”,³¹ or as a process through which the judge seeks to safeguard the rights upon which democracy is predicated.³²

In the case of the literature that addresses the judicial process of HCJ, the majority of the reviewed literature regarding the ‘judicial activism’ of the HCJ, makes use of this term in its “more progressive” meaning, particularly as it relates to the Court’s efforts to promote and protect fundamental human rights. It is also a connotation that I will adopt for the purposes of this paper.

From the various definitions as to the exact meaning of judicial review, at least two of them appear to be relevant to the debate regarding the judicial activism of the HCJ, and which are: the invalidation of the arguably constitutional actions of other branches;³³ and secondly; judicial “legislation” or “growth of law at the hands of judges”.³⁴

II. The Judicial Review Process of the HCJ: An Overview

Regardless of the position that legal jurists have held on the compatibility of judicial review and democracy, many would readily agree that “judicial review, is practiced at the borderline between

²⁹ *Ibid.*

³⁰ Stanley Brubaker, “Reconsidering Dworkin’s Case for Judicial Activism”, 46:2 *Journal of Politics*, (May 1984), pp. 503-519.

³¹ Chief Justice French, *supra* note 25.

³² Keenan Kmiec, *supra* note 24.

³³ However as the literature suggests, there are difficulties with defining judicial activism in light of the first, as it rests on a highly debatable conception of the role of the Supreme Court, and whether or not this Court should be the one to render the final explanation of the Constitution for all branches of government and declare the law, even in difficult or politically sensitive cases.

Ibid

³⁴ *Ibid.*

law and politics, which is where civil rights issues are also necessarily settled”.³⁵ In the case of Israel, the HCJ stands at the head of the Israeli judicial branch.³⁶

Although the promise of a Constitution was mentioned in Israel’s *Declaration of Independence* (1948), and which vested in the first elected legislative (the *Knesset*) the power to form one, to date Israel has neither a completely written Constitution nor a full bill of rights.³⁷ Instead, it was decided that the Constitution would be enacted gradually in the form of Basic Laws.³⁸ In 1958, the first basic law was enacted, which dealt with the legislative branch and its functioning. Subsequent basic laws also dealt with the structure of government, such as on the “President of the State” (1964); “the Judiciary” (1984), and the “State Comptroller” (1988).

In the meantime, it is important to underline the fact that the aforementioned *Declaration of Independence* underlined that the State will be “Jewish” and that it will also seek to “ensure *complete equality* [emphasis added] of social and political rights to all of its inhabitants, irrespective of religion, race or sex”.³⁹

Following its establishment, most of the laws enacted by the Knesset (the repository of both constitutional and legislative powers)⁴⁰ dealt with the institutional aspects of Israel’s constitutional system, and as a result, did not include entrenched clauses, which undermined the ability of courts to review ordinary legislation on the ground of constitutionality.⁴¹ As part of the conservative perception that did not allow every court to review governmental actions or to give

³⁵ Vukan Kuic, , *supra* note 15.

³⁶ As the HCJ, the Supreme Court may deal with matters involving issues of justice that do not fall under the jurisdiction of any other court. It also acts as a court of first instance and as an appellate court. See Guy Carmi, “A Constitutional Court in the Absence of a Formal Constitution? On the Ramifications of Appointing the Israeli Supreme Court as the Only Tribunal for Judicial Review” 21 *Connecticut Journal of International Law* (2005-2006), pp. 67-91.

³⁷ Due to the strong disagreement between different political forces and against the background of national security crises, following the 1948 war, this first Knesset declined to form any constitution. Yoav Dotan, *supra* note 1.

³⁸ Due to the lack of consensus on the need to develop a Constitution, a compromise known as the “Harari Proposal” was accepted, and which called for the enactment of Basic Laws as chapters of the future Constitution. See Guy Carmi, *supra* note 35. Today, there is a total of 14 *Basic Laws* in Israel.

³⁹ Israel Ministry of Foreign Affairs, “The Declaration of the Establishment of the State of Israel May 14 1948”, available at <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Establishment+of+State+of+Israel.htm>

⁴⁰ The prevailing academic view has been that the constituent powers inherent in the First Knesset are transferrable, and that therefore all succeeding *Knessets*, are with a potential constitution-making authority. See Amos Shapira, “Judicial Review without a Constitution: the Israeli Paradox”, 56 *Temple Law Quarterly* (1983), pp. 405-462.

⁴¹ This is on the grounds that this was not considered to be a valid constitutional principle. See Yoav Dotan, “Judicial Rhetoric, Government Lawyers and Human Rights: The Case of the Israeli High Court of Justice during the *Intifada*”, 3:2 *Law & Society Review*, (1999), pp. 319-363.

rulings that were directed at the executive, there was less than ample support for the idea of empowering lower courts with judicial review.

Nevertheless, in a case as early as 1953,⁴² the Court developed a theory in which it established that certain overarching values, such as those spelled out by the *Declaration of Independence*, provide a ‘normative umbrella’ that are to form the basis of civil rights that must guide the interpretation of all statutes, and entitle the court to undertake judicial review in accordance with these national values (and which include certain rights).⁴³

And while the IHCJ refrained in its ruling on *Bergman v. Minister of Finance* (1969)⁴⁴ from explicitly claiming for itself the competence of constitutional judicial review, and did not declare the contested law in question as unconstitutional, it revolutionized the Israeli legal system by introducing *de facto* judicial supervision of the constitutionality of primary legislation”. Equally important, it gave notice to the other branches of government that although the principle of equality is not stated explicitly in a written constitution or entrenched provision of basic law, “it is the soul of our entire constitutional regime”, and that therefore, all legislation must respect this principle⁴⁵

In 1992, two Basic Laws: the *Freedom of Occupation*; and the *Human Dignity and Liberty* were enacted Three years later, in the landmark *Mizrahi Bank* case,⁴⁶ the HCJ ruled that those new aforementioned laws brought about a “constitutional revolution”, by virtue of which courts were entitled to strike down ordinary legislation, whenever it contradicted the provisions of any of those laws. Thus judicial review became a systematic legal reality, including at the level of lower courts.⁴⁷

⁴² (HCJ) 73/53, *Kol Ha'am c. Minister of Interior*, 7(2) P.D. 871 (1953) (thereafter *Kol Ha'am* case) cited in David Kretzmer, “Constitutional Law” in Amos Shapira, ed, *Introduction to the Law of Israel* (Boston: Kluwer Law International), pp. 39-58.

⁴³ Aeyal, Gross, “Global Values and Local Realities: the Case of Israeli Constitutional Law”, [forthcoming in 2011].

⁴⁴ (H.C. 98/69), *Bergman v. Minister of Finance et Al* 23(1), Piskei Din 693 (1969). See also *ibid*.

⁴⁵ Amos Shapira, *supra* note 39.

⁴⁶ (C.A. 6821/93) *Bank Hamizrachi Hmeuchad v. Migdal* 49(4) P.D. 221. Guy Carmi, *supra* note 35.

⁴⁷ *Ibid*.

2.1. The Court and the Protection of Human Rights

Kuic argues that whether or not we entrust the protection of human rights to judicial review depends on how we perceive the interaction of law and politics. To make sense of judicial review, he advocates that instead of pursuing a traditional perception of politics as a struggle of power, with law as an integral instrumental part of it, we should think of law and politics as guided by human purposes. This perception allows us to consider that the goal of politics is to secure (in Madison's words in *the Federalist*) "the permanent and aggregate interest of the community", and which by definition, includes the respect for life and liberty. Only by assuming such potential of politics, can the notions of judicial review of human rights and dignity make sense.⁴⁸

Several authors have identified the expansion of 'rights jurisprudence' as a critical part of the development of constitutional traditions.⁴⁹ In the case of the Israeli HCJ, and as the previous section sought to demonstrate, some Israeli scholars have highlighted that fact that despite the absence of a written Constitution, and the existing political and security environment and the declaration of a state of emergency,⁵⁰ following the enactment of the 1992 Basic Laws, the Court managed to achieve a gradual common law protection of human rights.⁵¹ They also point out that in its efforts to achieve this objective; the Court made use of statutory interpretations to establish legal principles for the protection of human rights, and to ensure that those rights are balanced against the security concerns of the State.⁵² Furthermore, they argue that the HCJ demonstrated a willingness to develop human rights protections by using creative methods of statutory interpretations, noting that statutes must be read in light of the constitutional rights guaranteed in the Basic Laws, which tipped the balance in favor of individual rights and

⁴⁸ He advocates that one takes as his starting point, the definition of law as "a rule of reason, for the common good, made and promulgated by whoever is in charge of the community". Only this way will the rule of law make any sense. Vukan Kuic, *supra* note 15.

⁴⁹ Patricia Wood, "The Ideational Foundation of Israel's "Constitutional Revolution", 61:4 *Political Research Quarterly* (December 2009), pp. 811-824.

⁵⁰ Israel has been in a constant state of emergency since its establishment in 1948.

⁵¹ Guy Carmi, *supra* note 35.

⁵² One of the earliest decisions demonstrating that was the *Kol Ha'am* case (*supra* note 41) in which the Court ruled that the government is not allowed to use its powers to restrict certain freedoms, unless they are necessitated by an immediate and serious danger for the security of the State, or for public order. See also Yoav Dotan, *supra* note 1.

principles of equality.⁵³ Moreover, it resorted to normative sources of extra-statutory constitutional standards, which in the words of the Court stand “not only above any ordinary law, but also above the constitution”, and which reflect “fundamental rights not reduced to writing”, and “basic principles of equality, liberty and justice, which are the heritage of all orderly and enlightened states”,⁵⁴ as well as to foreign jurisprudence of Constitutional democracies and of international courts.⁵⁵

Although the judicially acknowledged freedoms were in theory always subject to infringement by the clear cut language of the Israeli Parliament (the *Knesset*), in practice the aforementioned legislative body, rarely used its sovereign supremacy to limit those freedoms, or legislative initiative to reverse such judicial reforms. Also in its relation with the executive branch, the Court considered that administrative measures, including subordinate legislation, which violate the principles of administrative legality and individual freedoms to be subject to judicial invalidation.⁵⁶ Furthermore, the Court subscribed to the presumption that an administrative authority may not infringe on the basic individual rights, unless a legislative design to the contrary has been clearly indicated.⁵⁷

Nevertheless, there are authors who continue to highlight that the impact of the “Constitutional Revolution” “unwritten bill of rights” (as those Laws were sometimes called) was in some respects severely limited, as they could not withstand *direct* legislation aimed at infringing human rights. In this regard, Carmi highlights that the way in which the Court had assumed its powers, and the tension that this created between it and the *Knesset*, overshadowed the Court’s achievement in protecting human rights.⁵⁸ Moreover, while the HCJ took the initiative to develop a wide array of principles, doctrines that would allow it to review the actions of the bureaucracy, the military and other administrative institutions,⁵⁹ several authors have highlighted that the

⁵³ Shamaï Leibowitz, “Understanding the Elements of Israel’s Constitutional System”, available at <http://israel-law.org/understanding-israel-s-constitutional-system>

⁵⁴ See Amos Shapira, *supra* note 39.

⁵⁵ Patricia Wood, *supra* note 48.

⁵⁶ Amos Shapira, *supra* note 39.

⁵⁷ See *Shtreit v. Chief Rabbi of Israel* (1964) 18 (I)P.D. 598, 612 *Loubin v. Municipality of Tel Aviv*, (1958), 12 P.D. 1041, 105, cited in footnote 77 of *ibid*.

⁵⁸ Guy Carmi, *supra* note 35.

⁵⁹ Yoav Dotan, *supra* note 1.

Court nevertheless continued to demonstrate moderation in its judicial review, and chose to strike down only a very limited number of statutes to date.⁶⁰

Furthermore, several authors have highlighted that these basic laws were applied in a much “less activist manner” in favor of Arab-Israeli citizens of Israel and to the Palestinians in the Opt, than towards the Israeli-Jewish population, on alleged grounds of ‘security concerns’.⁶¹ In this regard, it is also important to point out that whilst the Court recognized the applicability of the Basic *Law on Human Dignity and Liberty* to Israeli settlers and corporations residing in the Opt,⁶² to date, it has refrained from any explicit pronouncement on whether it is also applicable to the Palestinians in those territories.

2.2. A Judicially “Active” Court?

As noted above, several authors have alluded to the fact that despite the absence of a written Constitution, over the years, the HCJ adopted a more activist judicial approach, particularly regarding human rights and fundamental freedoms,

However, as Dotan notes, this did not happen overnight. And while the *Bergman* case ushered the beginning of a period in which the Court signaled its readiness to engage in an expansive use of judicial review of areas and issues towards which it had displayed a traditional conservatism and constraint (such as Palestinian human rights),⁶³ the Court, until late 1970s kept itself at a distance from direct judicial involvement in political controversies, by adopting a narrow definition of standing, justiciability, and review (including of decisions taken by the military and other security agencies).⁶⁴

⁶⁰ Guy Carmi, *supra* note 35.

⁶¹ See footnote 9 in Yoav Dotan, *supra* note 1.

⁶² (H.C.J. 1661/05) *Regional Council, Coast of Gaza v. Knesset of Israel*. It is important to mention that the transfer by an Occupying Power of parts of its civilian population into the territory that it occupies is illegal under international humanitarian law, (article 49 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, thereafter Fourth Geneva Convention), and that this body of law.” prohibits the establishment of settlements, as these are a form of population transfer into occupied territory.” See ICRC, “What does the Law say about the Establishment of Settlements in Occupied Territory?”, 5 October 2010 available at <http://www.icrc.org/eng/resources/documents/faq/occupation-faq-051010.htm> . According to the Israeli human rights organization B’Tselem, there are an estimated 500,000 Israeli settlers living in the Opt, including annexed East Jerusalem. See <http://www.btselem.org/settlements/statistics>

⁶³ Patricia Wood, *supra* note 48.

⁶⁴ Yoav Dotan, *supra* note 1.

Only in the 1980s, did one begin to discern a remarkable change “in almost all the aspects of judicial review”.⁶⁵ Over the years, the Court then expanded its judicial review into the political domain that was considered non-justiciable,⁶⁶ and reversed its prior rulings on the issues of standing⁶⁷ and justiciability,⁶⁸

Having introduced judicial review through its own initiative in a landmark case,⁶⁹ the HCJ began to review actions and institutions which previously enjoyed only partial or total immunity from judicial supervision, such as the military and security services (including in the Opt).⁷⁰ In addition, the Court imposed new requirements on administrative authorities, such as the duties of reasonableness, rationality of the decision-making process, and proportionality.⁷¹

The more ‘activist’ approach by the Court also manifested itself in several landmark cases, in which it used the Basic Laws to strike down as unconstitutional government policies or particular sections of a *Knesset* law. In 1981, the Court’s initiative culminated in a clear position by the Court concerning the normative quality of these “unwritten” extra statutory principles by noting that the applicable law in Israel “engulfs ...basic rules concerning ...individual freedoms..and...form an integral part of the law prevailing in Israel....”⁷² The HCJ also developed methods to overcome the traditional constraints that courts and their judicial review traditionally suffered from.⁷³

⁶⁵ *Ibid*

⁶⁶ This includes ruling on issues such as political decisions concerned with the achievement of ideological ends; the legality of political powers and political appointments. See Daphne Barak-Erez, “Judicial Review of Politics: the Israeli Case”, 29:4 *Journal of Law and Politics*, (December 2002), pp. 611-631.

⁶⁷ The Court decided that whenever a petition raises an issue of important constitutional merit, or when there is suspicion of serious merit, or when there is a suspicion of serious governmental violations of the principle of the rule of law, any person is entitled to bring the petition into court regarding of her/his personal interest in the outcome. *Ibid*

⁶⁸ As Justice Barak noted, “...the fact that an issue is ‘strictly political’ does not change the fact that such an issue is also ‘a legal issue’. See (HCJ 910/66) *Ressler v. The Minister of Defence* 42(2) P.D. 44. *Ibid*

⁶⁹ (CA 1908/94) *Mizrahi Bank v. Migdal* [1995] IsrPD 49(4) 221 cited in footnote 2 of Guy Carmi, *supra* note 35.

⁷⁰ Yoav Dotan, *supra* note 1.

⁷¹ *Ibid*

⁷² “[Moreover], the duty to preserve them is not merely political or socio-moral in its essence, but is also of a legal nature” See *Shiran v. Broadcasting Authority* (1981) 35 (III) P.D. 365, 377 cited in footnote 83 of *ibid*.

⁷³ For example, it ensured that the processes of adjudication at the HCJ is both informal and flexible; and improved its ability to monitor over time the process that follows certain decisions, and to evaluate the correctness and broad effects of those decisions. Moreover, the Court developed a number of doctrines and techniques that ensured it the formal and practical capability to intervene immediately in any public issue brought before it. *Ibid*.

Israeli scholars, who support the proposition that the HCJ has been a ‘judicially active’ court, highlight the influence that the Court came to develop over time as a key player within the Israeli polity. Hoffnug for example argues that these new *Basic Laws* affected judicial interpretation of current laws, and served as a check on the range of options considered by the legislature.⁷⁴ This readiness of the HCJ to involve itself in the political realm, contributed to its image “as a strong and influential court”,⁷⁵ and to the high level of public support of the judiciary within the Israeli public.⁷⁶

However others believe that despite these achievements, the deeply rooted legislative supremacy of the *Knesset*, and expansive powers of the executive, have made the Court’s “accomplishments” sporadic and piecemeal at best, as it forced the Court to adopt a rather “cautious” approach in the majority of its cases.⁷⁷ They also point out the fact that to date, the Court has in the majority of cases affirmed parliamentary legislation, and that when it comes to reviewing the petitions from Palestinians in the Opt challenging the actions and policies of the executive on grounds of their illegality, the Court has systematically yielded to the government’s ‘security’ considerations/justifications (at the expense of the human rights of the Palestinians), by either opting for a policy of non-intervention in those consideration, or interpreting law in a manner that does not challenge their legality.

III. Long Term Occupation or Annexation? Possible Implications of the Legal and Political Changes in the Territories for the Analysis of HCJ’s Judicial Review

One fundamental concept of law of occupation⁷⁸ is its temporary nature, and that it does not bestow sovereignty upon the Occupying Power.⁷⁹ Furthermore, resulting in certain rights duties,

⁷⁴ *Ibid*

⁷⁵ See Barak-Erez, *supra* note 63.

⁷⁶ Dotan, Yoav, *supra* note 1.

⁷⁷ Amos Shapira, *supra* note 39. See also Shamai Leibowitz, *supra* note 52.

⁷⁸ The law of occupation consists of Articles 42 to 56 of the Regulations annexed to the 1907 the Hague Conventions respecting the Laws and Customs of War on Land (thereafter Hague Regulations) and the Fourth Geneva Convention, as well as provisions of customary international law.

the latter cannot extend its own legal system to the territory and must ensure public order and safety whilst respecting the law prior to the occupation.⁸⁰ Moreover, it is only entitled to legislate in those territories if it fulfills certain conditions.⁸¹

This is not to deny the frequent occurrence of situations of long term occupation in modern world history.⁸² In this regard, while some scholars highlight that Israel's occupation is merely one that is long term⁸³ other scholars have claimed that Israeli is undertaking legal and political changes in the Opt, which have resulted in blurring the separation of Israel proper from the reality across the *Green Line*.⁸⁴ More importantly, this has led some to question whether the situation can be better described as that of annexation, considered unlawful under international law. The claim that this qualification applies, has particularly been loud with regards to the West Bank, where unlike the Gaza Strip; no disengagement has taken place.⁸⁵ Thus the debate surrounding the issue of whether or not Israel is in the process of annexing the West Bank highlights a potential problematic in the making, relevant to the topic at hand.

Scholars in favor of this view, highlight that even after the signing of the Oslo Accords between Israel and the PLO in 1993, much of the West Bank and its Palestinians remains legally controlled through thousands Israeli military orders,⁸⁶ and of Israeli laws that have “changed the effective legal status of the occupied territories”⁸⁷; and that Israel retains primary responsibility for military and security-related issues,⁸⁸ as well as “the necessary legislative, judicial and

⁷⁹ Sharon Weil, “The Judicial Arm of the Occupation: the Israeli Military Courts in the Occupied Territories”, 89: 866 *International Review of the Red Cross*, (June 2007), pp. 395-419.

⁸⁰ See Article 43 of the Hague Regulations and Article 64(1) of the Fourth Geneva Conventions.. The HCJ considers the Hague Regulations to be customary law and therefore applicable to the Opt. As for the Geneva Conventions, it upholds Israel's government position that it applies *de jure* and not *de facto* to the Opt.

⁸¹ These conditions are spelled out in Article 64(2) of the Fourth Geneva Convention and which are: to ensure the application of the Convention, to maintain order, and for the Occupying Power's own safety. See also Sharon Weil, *supra* note 78.

⁸² Adam Roberts, “Prolonged Military Occupation: The Israeli Occupied Territories since 1967”, 84:1 *American Journal of International Law* (January 1990), pp. 44-103.

⁸³ *Ibid*

⁸⁴ Amnon Rubinstein, “The Changing Status of the “Territories” (West Bank and Gaza): From Escrow to Legal Mongrel”, 8 *Tel Aviv University Studies in Law* (1988), pp. 59-79.

⁸⁵ This is not to say that the Gaza Strip is no longer occupied. However, given the disengagement that took place in 2005, the realities of occupation manifest themselves in a different manner there than in the West Bank. Hence, I will focus on the latter.

⁸⁶ Amnon, Rubinstein, *supra* note 83.

⁸⁷ *Ibid*.

⁸⁸ The Oslo Accords provided for the redeployment of Israeli forces and transfer of various responsibilities and spheres of authority to the Palestinians. The Palestinian Authority assumed “the powers and responsibilities for internal security and public order,” and the administration of specific civil spheres in approximately 17% of the OPT, also known as Area A. The remaining territories were divided into Areas B (24%) where the PA and Israel were to have joint jurisdiction, while Area C (59%) came under Israeli jurisdiction. See *Waiting for Justice*, Al-Haq, Ramallah, West Bank, June 2005.

executive powers and responsibilities”⁸⁹ Moreover, it has been argued that Israel continues to allow its citizens to settle in the West Bank,⁹⁰ (including East Jerusalem),⁹¹ a move that has been considered illegal under international law,⁹² and has extended Israeli law to them as a matter of personal and extra-territorial jurisdiction.⁹³

Since 1967, extensive changes have also been brought about in key areas, most notably in the areas of land ownership, use of water resources, and building construction.⁹⁴ Furthermore, in June 2002, Israel began the construction of a Wall separating much of the West Bank from Israel proper, on grounds that there is a need to prevent the uncontrolled entry of Palestinians and to combat terrorism inside Israel proper.⁹⁵ Those arguing in favor of the idea that the true motive is annexation, point out that only an average 20% of the Wall’s route follows the *Green Line*.⁹⁶ And whilst theoretically, those and other changes should have had significant implications on the nature of the Israeli system of government, as Rubinstein points out, these changes had no impact on the statutory framework through which the territories are controlled.⁹⁷ In this regard, Israeli authors have pointed out that this is due to the fact that the State empowered itself to exercise control over the territories, whilst abstaining from “officially” incorporating the Opt into

⁸⁹ Article V of the *Gaza-Jericho Agreement* (Oslo I) 1994. While scholars did debate the effects of the Oslo Accords on the applicable legal framework in the Opt, the exercise by Israel of military and administrative control of all areas A, B, C after 2000 lends support to the argument that the general regime of occupation law remains applicable. See Program on Humanitarian Policy and Conflict Research, “Occupation, armed conflict, and the legal aspects of the relationship between Israel, the West Bank, and the Gaza Strip: A Resource for Practitioners”, Policy Brief, September 2008, available at <http://opt.ihlresearch.org/index.cfm?fuseaction=Page.viewPage&pageId=2043>

⁹⁰ By end of 2008, 479,500 Israeli settlers are estimated to live in 121 settlements in the West Bank, including East Jerusalem. See statistics by the Israeli Information Center for Human Rights (B’Tselem) at <http://www.btselem.org/english/Settlements/Statistics.asp>

⁹¹ In 1980, the Knesset passed the “Basic Law Jerusalem” by which it declared the unified city of Jerusalem to be the eternal capital of Israel.

⁹² Article 49.6 of the Fourth Geneva Convention. As Roberts notes, “in accordance with the view that occupation is a provisional state of affairs, the imposition of demographic changes has been considered unlawful”. See Adam Roberts, *supra* note 81.

⁹³ Examples of such laws include the Income Tax Ordinance (Amendment No.32) Law, 5738-1978, and the Nationality (Amendment No. 4) Law, 5740-1980. This, the author notes, is in violation of the principle of territoriality in modern jurisprudence. Some laws are applicable exclusively to Israeli settlers living in the Opt, and not to the Palestinians. Furthermore, the Minister of Justice has the power to add new laws that would be applicable. See Amnon Rubinstein, *supra* note 83.

⁹⁴ Several of those measures have caused concern on several grounds such as discrimination against the economic activities by Palestinians, the creation of an economy that is dependant on Israel, and that the use of certain resources, benefit Israelis living there and not Palestinians. See Roberts, Adam, *supra* note 79.

⁹⁵ The Israeli Information Center for Human Rights (B’Tselem), “Separation Barrier”, available at http://www.btselem.org/English/Separation_Barrier/

⁹⁶ Al-Haq: Law in the Service of Man, “The Wall in the West Bank”, November 2006. They also point out an Advisory Opinion in 2004 by the International Court of Justice in which it noted that Israeli security concerns failed to justify the Wall’s construction, or that it was “the only means” to combat the threat posed to its citizens by Palestinians. Instead, it linked this construction to the Israel’s efforts to protect its settlements and settlers, “and to create as *fait accompli* that could lead to *de facto* annexation. See International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian*, July 2004, paragraph 120-121 and 140.

⁹⁷ Amnon Rubinstein, *supra* note 83.

Israel proper, in order to avoid the possible implications of granting the Palestinian residents full equal rights.⁹⁸

Conclusion

Examining the HCJ in the Israeli case, it is clear that the Court's judicial empowerment was primarily made possible through its own initiative,⁹⁹ and that it displayed a willingness to "push the boundaries" of what it is entitled to develop as norms or to render as judgements. Furthermore, there appears to be a general consensus that the IHC has made significant strides in the promotion and protection of fundamental human rights, particularly those of Israeli Jewish citizens.¹⁰⁰ Following the Constitutional revolution, there have been dozens of petitions challenging legislation, actions, and policies that infringe on individual rights and freedoms, causing both the *Knesset* and the executive government to take into account the possibility that the legislation or policy in question will either be struck down by the courts, or considered illegal.¹⁰¹ As a result, debate amongst scholars is less and less focused today on whether or to what extent the HC's judicial review qualifies as "judicial activism" (in the more positive meaning of the term) in so far as human rights are concerned, and appears to consider it more of an established legal reality.

Even when it comes to the Court's adjudication of Palestinian rights, the debate in the existing literature seems to be confined to whether and to what extent; the Court's more general 'rights jurisprudence' has had the required spill over effect on the status of the fundamental rights of the Palestinians in the Opt. As has been noted in the beginning, many scholars who have addressed

⁹⁸ "Courting Conflict: the Israeli Military Court System in the West Bank and Gaza by Lisa Hajjar", Review by Menachem Hofnug available at <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/hajjar705.htm>

⁹⁹ Patricia Wood, *supra* note 48.

¹⁰⁰ The issue is still controversial when it comes to the rights of the Arab citizens of Israel.

¹⁰¹ Shamai Leibowitz, *supra* note 52.

this issue remain divided between supporters of the usefulness of petitioning the Court,¹⁰² and those who believe it is futile.¹⁰³

Given the fact that “disagreements about rights are often about central applications”,¹⁰⁴ it is hardly surprising that such a controversy exists, all the more when it comes to rights in the Opt. As has been noted before, the prolonged Israeli control of the Opt (more than 40 years) introduces an important time related factor,¹⁰⁵ that is having significant legal consequences for the balancing of human rights of the civilian population vis-à-vis the security of the Occupying Power, and which needs to be addressed if the judicial review of the Court is to be enhanced.

Here, the approach that one adopts depends on the departing point, and which in turn influences the kind of problematic that unfolds. If the departing point is that Israel’s occupation of the Palestinian Territories qualifies as nothing more than a case of long term occupation, several scholars have argued for the modification of the rules of law applicable during times of occupation, in order to overcome the challenges that may result from any efforts to balance the rights of the occupied, against the security of the Occupier, (magnified by the long term nature of this occupation).¹⁰⁶ A second group is less hopeful, that this is feasible, given that “occupation law remains a sensible and essentially conservationist set of rules”; and the fact that “military occupation remains a contentious issue”.¹⁰⁷ Still, a third category believes that long term occupation does not qualify as a special category of its own, nor should it, as the danger arises that “those parts of the law of war that deal with military occupation may not be fully applicable

¹⁰² Here it been noted that the Court has demonstrated an ability and willingness to challenge or reverse those policies, on substantive grounds, particularly through its interpretation of relevant principles of international human rights and international humanitarian law. “Landmark cases” are said to be effective in holding the State accountable for its actions in the Opt and protecting rights. Other authors have highlighted the fact that “final court decisions are like the tip of the iceberg”, and that one must analyse the informal legal practices within the framework of judicial decision-making, before evaluating the role of the Court

¹⁰³ On the other hand, it has been argued that the Court has systematically deferred to the government’s position and that it has traditionally tilted towards interpreting relevant international legal principles and national laws, in a manner that does not challenge the legality of the policies and actions in question, thereby rendering the international protections afforded to the population of the occupied territory ineffective.

¹⁰⁴ Jeremy Waldron, *supra* note 8.

¹⁰⁵ Yuval Shany, “Forty Years after 1967: Reappraising the Role and Limits of the Legal Discourse on Occupation in the Israeli-Palestinian Context”, 21 *Israel Law Review* (2008), pp. 6-12.

¹⁰⁶ Adam, Roberts, “Transformative Military Occupation: Applying the Laws of War and Human Rights”, 1000:3 *American Journal of International Law* (July 2006), pp. 580-622.

¹⁰⁷ *Ibid.*

and that departures from the law may be permissible”.¹⁰⁸ Rather it is argued that the key to overcoming those challenges is to reconsider the relation between human rights law and humanitarian law because of the “direct and concrete implications for the lives and welfare of those living under military occupation.¹⁰⁹ A fourth group has begun advocating the adoption and application of the term “illegal occupation”¹¹⁰ to situation such as Israel/Opt to “open up avenues for action”.¹¹¹

Regardless of the stand one takes, if our departing point is that it is indeed a long term occupation, then one accepts the law of occupation as being the framework that governs, or is supposed to govern the parameters of the judicial review by the HCJ of Palestinian rights. Within this framework, one might then discover that the problematic rests either in the judicial review process itself of the Court (for example: in how the Court has interpreted relevant and/or applicability of human rights and international humanitarian law provisions¹¹² in the legal reasoning it furnished for its decisions),¹¹³ or in the limitations inherent in the law of occupation of dealing effectively with challenges arising from modern time situations of occupations (such as that of the Opt and Iraq).

If on the other hand, the departing point is that Israel’s control of some or all of the territories qualifies as an annexation, then a different kind of problematic that arises. In this regard the preliminary review of the existing literature indicates that much of the debate regarding the legality of ‘judicial activism’ is in fact a debate concerning one core issue: the appropriate role of judge within a democracy,¹¹⁴ This signifies that the pre-requisite for success of Courts in acting as vehicles for social change and the defence for human rights is that it takes place in a

¹⁰⁸ In fact as one author notes, it remains doubtful whether it consists a special category, as the danger arises that “those parts of the law of war that deal with military occupation may not be fully applicable and that departures from the law may be permissible”. *Ibid*

¹⁰⁹ See Noam Lubell, “Applicability of Human Rights Law in Situations of Occupation”, in, *Collegium-Special Edition, Current Challenges to the Law of Occupation*, Delegation of the International Committee of the Red Cross, Brussels, No. 34 (August 2006).

¹¹⁰ Traditionally, a situation has to factually amount to occupation for the law of occupation to apply. However there is judgement passed about its lawfulness. See Daniel Thuerer, “Current Challenges to the Law of Occupation” in *Ibid*

¹¹¹ Ronen argues that there are precedents where this definition has been recognized and used, and that an occupation should be considered an international wrongful act, and must not be “recognized” when it violates certain peremptory norms of international law. See Yael Ronen, “Illegal Occupation and Its Consequences”, *41 Israel Law Review* (2008), pp. 201-245.

¹¹² Both are applicable in situations of occupation.

¹¹³ The HCJ recognizes as customary international law the entirety of the Hague Regulations, and the de facto applicability of certain provisions of the Fourth Geneva Convention. See Program on Humanitarian Policy and Conflict Research, *supra* note 88.

¹¹⁴ Roberts Caprice,, *supra* note 26.

representative political system. As mentioned previously, the idea that Israel as it exists today is a democratic political system is treated as an established fact: It enjoys universal adult suffrage,¹¹⁵ and a representative legislature to which fair and regular elections are held. Moreover, Israeli scholars have reiterated that the principles of liberty and justice help define the rules of recognition for the Israeli legal system.

Nevertheless, despite the significant legal repercussions of more than 40 years of Israeli rule, Palestinians in the Opt are not citizens. Therefore, they are not represented in the legislative or the executive of which forms the two other branches of the political system to which the Court belongs. Consequently, they have no means of affecting the processes or debate which may affect the Court's judicial review process in the Opt. Arguably this casts doubt on the democratic representation of the political system. And although the idea that a connection exists between democracy and political equality is not new, for it to become a concrete reality, it must translate itself into the power to influence the policies which the government will adopt, or of turning one's individual decision into a collective one.¹¹⁶

In this regard, the debate surrounding the need to grant Palestinians in the Opt citizenship is also not a new one.¹¹⁷ However, one needs to consider repercussions of this debate. Arguably, one could conclude that the limited impact that the Court's adjudication of petitions from Palestinians in the Opt has had on the protection of their rights is the result of structural limitations that result from the fact that this review is not emanating from a democracy that represents all of those whose rights are at stake. Perhaps there is only so much a Court can do in its efforts to uphold rights given the limitations imposed on the political system from which it emanates. A solution to this problematic may not lie in law after all, but in politics. In this regard, two options exist: the end of the occupation, or the granting of Israeli citizenship to the Palestinians in the West Bank and Gaza Strip.

¹¹⁵ Israel's electoral system is based on nation-wide proportional representation in which Israeli citizen (18 years of age or older) has the right to vote, and every 21 years old or older, can be elected "The Electoral System in Israel", available at http://www.knesset.gov.il/deSCRIPTION/eng/eng_mimshal_beh.htm#6

¹¹⁶ Horacio Spector, *supra* note 10.

¹¹⁷In the words of one Israeli political analyst, the situation on the ground can be summarized as follows: "If Israel wants to continue to hold on to the occupied territories and to be a democracy, it must grant full citizenship and civil rights to the millions of Palestinians who presently live under the dual governance of the Israeli military occupation and the Palestinian Authority". See Aluf Benn, "Israel's Identity Crises", 16 May 2005, at <http://dir.salon.com/story/news/feature/2005/05/16/identity/index.html>

However, given the unlikelihood of Palestinians being granted citizenship in the short term,¹¹⁸ or that the law of occupation is revised or redefined overnight to take account of the challenges posed, Palestinians in the meantime are left in a vague legal limbo, as they struggle with a limited venue for seeking effective remedy for violations of their human rights at the domestic Israeli level. Whichever conclusions one draws, there is no doubt that the judicial review by the HCJ is likely to continue having significant consequences not just for the rights of the Palestinians, but also for the rule of law in Israel.

¹¹⁸ At the moment, neither the Israeli government nor public is willing to consider the idea of granting Palestinians in the Opt Israeli citizenship. However some analysts speculate that sooner or later, Israel may have to deal with this question. *Ibid.*